In the Supreme Court of the United States.

OCTOBER TERM, 1899.

MAY HAYS, APPELLANT,
v.
THE UNITED STATES. } No. 19.

OJO DEL APACHE GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This suit was instituted by the claimant filing his petition in the Court of Private Land Claims on February 17, 1893, for the confirmation of the Ojo del Apache grant, situate in San Miguel County, N. Mex., alleged to contain 11 square leagues, or 47,743 acres (R., 1–4).

Subsequently an amended petition was filed, on which the cause was tried, which alleged substantially (R., 11–15) that prior to July 2, 1842, Manuel Armijo, then governor of New Mexico, granted the tract in question to Ventura Trujillo, in accordance with his petition for the same, and by decree directed the constitutional alcalde of the demarcation of San Miguel del Bado to place the petitioner in possession of the land; that said alcalde afterwards made his return that he had placed the petitioner in juridical possession of the land as directed, which return, together with the original papers, was duly deposited in the archives of New Mexico.

That the petitioner has in his possession neither the original of said petition nor a copy thereof, nor the order and decree of said governor, nor the return of said alcalde, and that the same are not in the possession of the surveyor-general of New Mexico; but he alleges that the archives of New Mexico, previous to the occupation of the Territory by the United States and for some time thereafter, were kept carelessly, and many of the papers and documents therein were lost and destroyed, the above being above the number.

Plaintiff then mentions several witnesses by which the grant, petition, order, and juridical possession can be proven.

It is further alleged that on July 2, 1842, Damasio Salazar, a justice of the peace, placed the petitioner in juridical possession of the tract mentioned, describing the boundaries, acting in conformity with the laws and customs of New Mexico, and that said Ventura Trujillo entered into the possession of said tract so granted and

occupied the same for about four years from July, 1842, and that ever since and up to the present time his legal representatives and those claiming under him have held, claimed, used and occupied, owned and grazed upon peaceably and notoriously the whole of said land.

That at a time not specified the then owner of said grant made application to the surveyor-general of New Mexico for the approval of said grant, under the provisions of the law of July 22, 1854, which application was rejected and approval denied, the surveyor-general finding that said grant was made by a justice of the peace, who, under the laws of New Mexico, had no power to make a grant of land. That subsequently an application was made to said surveyor-general to reopen said application for confirmation, to receive new testimony, which testimony was taken, but it appears no further action was had on the matter, and said application is now on file in said office.

The petition contained other formal allegations bringing it within the provisions of the act of March 3, 1891, establishing the Court of Private Land Claims.

On August 25, 1896, upon motion of the United States, an order was made requiring the plaintiff to serve adverse possessors and claimants with citations and copies of his petition, and on October 24, 1896, the answer of these adverse possessors was filed (R., 19–21), specifically denying the allegations of claimant's petition, save as to the nonpossession of the original title papers and the proceedings before the surveyor-general, as set forth in the petition. It contained further allegations as to their derivation of title to certain portions of said land under

the public-land laws of the United States and the issu of patents thereon by it.

On November 12, 1896, the answer of the United States was filed (R., 23, 24), which put in issue generally the allegations of claimant's petition, and alleged further that if any such grant had been made as claimed, the same was abandoned by the grantee within a short time after he took possession.

The trial of the cause was had on November 13 and 16, 1896. The claimant presented as his original muniment of title a document purporting to be the act of juridical possession, reading as follows (R., 57, 58):

> Seal fourth. [SEAL.] One-fourth real.
>
> For the year eighteen hundred and forty and eighteen hundred and forty-one.
>
> In this second demarcation San Miguel del Bado, on the second day of the month of July of the present year, eighteen hundred and forty-two, before me, citizen Damasio Salazar, justice of the peace of said precinct, personally present appeared citizen Bentura Trujillo, citizen and resident of the first demarcation, soliciting the place and land commonly called the Ojito del Apache, to establish, in company with his children, a farm on which he believes he will have the means necessary for the support of a large family, and to give tithes (illegible) and the holy church their corresponding portions, and I, said alcalde, finding the petition to be a just one and acting in conformity with the supreme decrees, have made him said donation in the name of God and the supreme Mexican nation, so that as a good compatriot he may make use of it, observing the require-

ments which our laws provide, under the condition and restrictions that if he does not provide a protection to prevent the damages which may result to him he is under obligation to bear them, it being commons and pasture grounds of the inhabitants of this precinct; and the boundaries corresponding to said grant are on the north the mesa; on the south the old road to Los Chupaines; on the east the mesa de los Chupaines, and on the west the hills bordering on the Canoncito de las Lagunitas; and in order that this foregoing instrument may have the force and validity by law required the aforesaid Trujillo requested me to interpose my authority and judicial decree, and I, the said justice, declared that I would interpose, and did interpose as far as I am authorized by law, those of my attendants signing with me with whom I act by appointment for the notorious lack of a notary public, there being none of any kind in this department. In form of law, to all of which I certify.

DAMASIO SALAZAR.

Attending:
RAFAEL ARAGON.

Attending:
SALVADOR GONZALES.

And it is given on this antestamped paper, there being none of the proper stamp.

SALAZAR.

Claimant presented (R., 28, 29) numerous mesne conveyances, tending to connect himself with the original grantee, which are omitted from the record by stipulation (R., 118, 119).

The testimony of the custodian of the archives in the office of the surveyor-general was presented to show that

the original grant papers did not now exist among said archives (R., 25–28).

The deposition of Juan Bautista Lucero, the only witness testifying before the surveyor-general on the first application for approval of the grant, was introduced by claimant (R., 98, 99) to the effect that he was the purchaser of the grant from the original grantee, and first knew of its occupation by him in 1855.

The depositions of Rafael Aragon (R., 100, 101), secretary of the alcalde who gave the juridicial possession alleged, and Guadalupe Miranda (R., 102, 103), secretary of New Mexico at the time the grant was made, taken at the hearing of the second application to the surveyor-general for approval of the grant, was introduced by claimant, which was that the governor had made a valid grant and that the constitutional alcalde had acted under it when he put said Ventura Trujillo in possession of the tract.

The depositions of several witnesses, taken by one of the justices of the court previous to the trial, were introduced in evidence by the claimant (R., 63–98). These tended to show that the tract in question had been occupied by the original grantee and those claiming under him ever since the date of the alleged grant, and, indeed, for some years previous thereto, and also described the boundaries of the land.

Oral evidence was introduced by the Government (R., 29–56) showing that the land in question had never been occupied by the alleged original grantee, but that he and his family, on the contrary, lived at the date of his

death, and for many years previous thereto, at a point miles distant from the land in question (R., 30, 39, 42). That while the alleged grantee had been upon the land in 1842, he never made any improvements thereon, and after remaining a few days left the premises with the declaration that the paper for which he paid the justice of the peace was worth more than the whole grant (R., 50). That the property at that time and for years subsequent to the American possession had been used and regarded as common pasture ground for the people of the vicinity, the alleged grantee or his representative making no claim to be the owner thereof.

It was also shown that the index of the Spanish and Mexican archives, purporting to be a complete and full one, completed in the year 1851, contained no mention of any grant by the governor of New Mexico, as contended for by the claimant (R., 57).

Upon the proof thus submitted the case turned largely upon the construction of the original muniment of title presented by the plaintiff, which has already been set forth in full. Claimant's contention was that the paper in question was not a grant, but a record of a mere act of possession by the alcalde, made pursuant to a grant by the governor, subsequently lost or destroyed, it being urged that the expression "in conformity with the supreme decrees" referred to an order from the governor, under whose direction, it was alleged, the alcalde was acting.

On behalf of the Government it was contended that the paper presented showed conclusively that the concession in question was a grant by an alcalde, acting

upon his own authority and arrogating to himself the right to alienate the public domain. It was pointed out to the court that this document showed that the alcalde acted upon a petition presented directly to him, asking for the land; that he in so many words made a grant or donation of the tract; that so far from the paper being an act of possession there was nothing in it to indicate that the alcalde did give possession, and it was not in the form theretofore and subsequently used by alcaldes in conferring juridical possession in such cases, which always recited the entry upon the land by the grantee in company with the alcalde and the immediate commission of acts denoting proprietorship, etc. The Government contended that the "supreme decrees" referred to were not orders from the departmental government, which was always referred to in such documents as the "superior government," but were the general laws of the Mexican nation under which the alcalde assumed that he had the right to donate the public domain. It was argued that the recitals of the very paper upon which plaintiff founded his claim negatived at every point the oral testimony and depositions presented to show that the governor of the department of New Mexico had anything whatever to do with the grant in question. Finally, it was contended that the grant, being on its face a concession by a mere alcalde, should be rejected, that official having no authority, under the laws of Mexico, to make a grant of the public domain.

On November 23, 1896, the Court of Private Land Claims rendered its opinion, per Fuller, A. J. (R., 115–

117), sustaining the contentions of the Government, and a decree was entered rejecting the claim and dismissing the petition.

On May 21, 1897, plaintiff was allowed an appeal to this court.

ARGUMENT.

The decision of the Court of Private Land Claims in this case is correct and should be affirmed for the following reasons:

1. Assuming, as contended for by claimants, that a grant of the tract here claimed was made by Governor Armijo in 1841 or 1842, that official had at that date no power or authority to make a grant of the vacant public lands of the Mexican nation, or to initiate proceedings for that purpose; and the alleged grant is void for lack of power in the granting officer.

2. Even if, as contended for by claimants, that official made such a grant, and had power so to do by virtue of the provisions of the regulations of November 21, 1828, such an order made by the governor does not constitute a claim such as the Court of Private Land Claims has jurisdiction to confirm, it not being a claim "complete and perfect at the date of the treaty, nor one which claimants would have had a lawful right to make perfect had the territory not been acquired by the United States."

3. There is no sufficient proof of the making of a grant by Governor Armijo, as alleged in claimant's petition.

4. Assuming that a grant was made by Governor Armijo, as alleged, there is no proof of the character of

the grant sufficient to enable the court to say that it is a claim within its jurisdiction.

5. The possession shown by plaintiff does not justify the presumption of a grant from competent authority.

I.

Assuming, as contended for by claimants, that a grant of the tract here claimed was made by Governor Armijo in 1841 or 1842, that official had at that date no power or authority to make a grant of the vacant public lands of the Mexican nation, or to initiate proceedings for that purpose, and the alleged grant is void for lack of power in the granting officer.

Upon this proposition it is not desired to submit anything in addition to what is contained in the brief in the case of *Ortiz* v. *United States*, No. 20, this term, under point *one*. It is believed that the authorities there urged clearly establish that the governor of New Mexico had subsequent to 1837 no right to make a grant; certainly no right to gratuitously alienate the public domain.

II.

Even if, as contended for by claimants, Governor Armijo made a grant, and had power so to do by virtue of the provisions of the regulations of November 21, 1828, such an order made by the governor does not constitute a claim such as the Court of Private Land Claims has jurisdiction to confirm, it not being a claim "complete and perfect at the date of the treaty, nor one which claimant would have had a lawful right to make perfect had the territory not been acquired by the United States."

It is not pretended by claimants that the alleged grant by Armijo to Venturo Trujillo was ever approved by the departmental assembly or council. Under the regulations of 1828, until it was so approved, the concession was not definitively valid; it was an imperfect title. In the case of *Ortiz* v. *United States*, *supra*, it has been fully argued for the Government that the approval of the title and its final consummation was a matter absolutely of discretion on the part of the assembly, and that the claimant had thus under the former government no lawful right to demand that his title be perfected. It is there further argued that such a claim is not within the jurisdiction of the Court of Private Land Claims, that tribunal being limited to the confirmation of perfect claims and those which, if not complete and perfect at the date of the acquisition of the territory by the United States, claimants would have "had a lawful right to make perfect."

It is not desired to add anything to the views urged on this subject in the Ortiz Case, which are entirely applicable to the record now under consideration.

III.

There is no sufficient proof of the making of a grant by Governor Armijo, as alleged in claimant's petition.

The pretense that the premises here in dispute were granted to Venturo Trujillo or any one else by Governor Armijo is a matter of comparatively recent development, a manifest afterthought. Certainly one of the first propositions which impresses the purchaser or holder of

property is the source of his title and the name of his grantor; and the further we go back toward the primary source of title the more likely are we to arrive at a correct statement of what that source of title is. The earliest indication given by the record as to the source of the title here asserted is contained in the petition to the surveyor-general of New Mexico, filed before him by John L. Taylor, claimant of this tract, about the year 1870, in which the following allegation as to the derivation of the title is found (R., 105):

> Your petitioner would further state that said grant of land was duly made according to law and the usage and customs of the laws of Mexico on the second day of July, eighteen hundred and forty-two (1842), by *one Demasio Salazar*, a justice of the peace in the said county of San Miquel del Bado, to one J. C. Ventura Trujillo, a resident of said county of San Miquel del Bado.

It is to be presumed that Taylor made inquiry when he bought this grant as to who made it. Certainly any careful purchaser would have done so, even though, as here, the purchase price was only $12 for a tract of 50,000 acres (R., 99). This statement by Taylor that his grant was made, not by Governor Armijo but by Damasio Salazar, a justice of the peace, is thus most significant, and must have been based upon information secured by the petitioner in his earliest and most reliable investigations into what he was purchasing. Upon this statement of his claim Surveyor-General Proudfit (R., 108) found the grant to be not entitled to confirmation by Congress, and so reported. A reading of his very thorough report will show

that the controversy before him turned not on whether Armijo had made the grant; it was not at that time pretended that he had done so. The claim was based entirely on the contentions that the justice of the peace, Damasio Salazar, had made the grant and that he was empowered by law to make it. This view Mr. Proudfit did not accept, and his unfavorable report is on the ground that there was no power in Salazar to make a grant. This last question is not in the case on the present record, counsel for claimant very properly disclaiming (Brief, p. 9) any contention "that Damasio Salazar as justice of the peace, or alcalde, could have made this grant."

After this decision of Mr. Proudfit had been transmitted to Congress Mr. Taylor filed a petition in the nature of a motion for a new trial on ground of newly discovered evidence (R., 113). Mr. Proudfit entertained this petition to the extent of permitting the parties to secure their additional testimony, which he transmitted to the Commissioner of the General Land Office (R., 114), but at the same time stated that there was nothing therein leading him to desire to modify his original opinion. He also expressed his doubts as to having any jurisdiction to receive this further testimony, "the matter being now before Congress."

It is upon this further testimony, so secured, that of Guadalupe Miranda and of Rafael Aragon (R., 100–103), that appellants rely for a disapproval by this court of the decision of the officer provided by the act of July 22, 1854, for the investigation of this character of claims and the reversal of the court below, a tribunal provided

by the act of March 3, 1891, for the same purpose. In making the statement that the testimony of Miranda and Aragon constitute all of claimant's foundation for seeking a confirmation, sight is not lost of the fact that one or two of the witnesses examined by claimants at the trial stated that they had heard that this land was granted by Armijo. None of these made the slightest pretense, however, that they had ever seen such a grant, and their testimony throughout is so clearly hearsay that it will not be further discussed; and the portion of the record to which attention will be given is that containing the testimony of Miranda and Aragon. As a preliminary consideration, the Government begs to repeat now the objection urged on the hearing (R., 25, 28) as to the admissibility of this testimony. This objection is threefold: *First*, that no sufficient foundation is laid in the record for secondary evidence of the grant; *second*, that the surveyor-general of New Mexico was without authority, after making his report to Congress, to take this testimony; and *third*, that even if he had that power he had no right to delegate it to the deputy clerk of a district court.

The only law under which Armijo could possibly have made a grant in 1841–42 is found in the Regulations of November 21, 1828. As above argued under point One, even these regulations were not in force at that date, so that he was wholly without authority to make grants in colonization. But assuming, *arguendo*, that they were in force and that Armijo was acting under them in this matter, it was his duty, after an examination, to "grant or not

the application," as he might see fit. (Sec. 4 of Regulations of 1828.) Under the Mexican procedure, as revealed by the California cases (*Bolton's Case*, 23 How., 347; *Peralta Case*, 3 Wall., 434) and the New Mexico cases appealed to this court, the governor was accustomed to make a granting decree, retaining the original in the public archives, with a record thereof in a book provided for that purpose (*Peralta Case*, 3 Wall., 434), and giving a *testimonio* or second original thereof to the grantee. This was done, on the one hand, in order that the Government might have duly recorded in its archives so important a matter as the donation of its public lands, and the grantee, on the other hand, might likewise have in his possession a paper evidencing the governor's act. Assuming that the governor complied with the law in each of these respects, before secondary evidence can be received of his acts both of these originals must be accounted for—the one retained in the archives, the other given to the grantee. It is respectfully submitted that this has not been done in the present case. So far as the archive copy is concerned, the proof here submitted falls very far short of the standard fixed by *Peralta* v. *United States* (3 Wall., 440) and quoted by claimants' counsel at page 50 of his brief. There it is said:

> If the claimant can show to the satisfaction of the court that the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed, he will be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for.

Here the proof does not establish that there was ever such a grant made nor that such a grant was ever recorded in the archives of Mexico; nor does it establish that such a grant has been lost or destroyed from said archives. The Vigil Index, to which reference is made on page 57 of the record, is a part of the archives of the surveyor-general's office, having been turned over to that official upon the institution of his office under the act of 1854.

This index purports to have been made by Antonio B. Vigil and to have been completed in the year 1851, and it was admitted by counsel for claimants (R., 57) that "the index was so made." It is entitled "A General index of all documents of the Government of Spain and Mexico up to the year 1846," and an examination of it by this court (it being now in the custody of the clerk, having been certified up in the case of *Ortiz* v. *United States*, No. 20, this term) will show that it is a rather pretentious volume. In view of its custody and its age it is entitled to very great respect as bearing on matters which it purports to affect, and it is certainly entitled to as great weight as the Hartnell Index, which is referred to so frequently in the California cases. In this index there is stipulated to be no mention of the Ojo del Apache grant, and if we are to impute to this ancient volume, found in the proper custody, the verity which such documents are always presumed to possess, that of being what they purport to be, the Vigil Index establishes that at the date of its completion in 1851 there was no Ojo del Apache grant in the archives. If this be true,

then the rule established by the Peralta Case (*supra*) has not been complied with by claimants, for the proof thus shows that there was "no grant made in conformity to law and recorded." The fact, as stipulated by the Government on request of counsel for claimants (R., 57), that "a portion of the Spanish and Mexican archives in this Territory was lost, sold, or destroyed in the year 1870, containing grants and other papers," is of no relevance.

If, as the Vigil index shows, the Ojo del Apache grant was not in the archives in 1851, it could not have been destroyed in the alleged spoliation of the archives under Governor Pile in 1870, and that much exaggerated incident is entirely immaterial and irrelevant. Claimant's counsel seeks in his brief to destroy the force of the Vigil index as evidence bearing on this case in the suggestion that its incompleteness is shown by the fact that no mention is found therein of the Cubero grant, confirmed by this court in *United States* v. *Chaves* (159 U. S., 464). This fact, however, has no bearing. The grant claimed in that case is alleged to have been made in 1833. This record (p. 57) has a stipulation to the effect that certain archives of the Mexican Government were lost or destroyed in the year 1837. The absence of the Cubero grant from the Vigil index is thus readily accounted for in the supposition that it was among these archives destroyed in 1837. Between the alleged date of the Ojo del Apache grant in 1841 or 1842, and the Vigil index dated in 1851, however, there was no spoliation of the archives, and the only theory upon which the absence of the Ojo del Apache grant can thus be explained is the

fact that it was not there when Vigil made his index—and for the very best of reasons, that it was never made.

The archives develop another fact which shows strongly that this grant was never made and consequently never recorded.

The deposition of Guadalupe Miranda (R., 102) is to the effect that the petition for this grant was presented to Armijo about 1841 or 1842. Miranda does not pretend to recollect the exact date. Aragon, the other witness (R., 100), testifies that the grant was made in the year 1841 by the alcalde, Damasio Salazar, pursuant to an order of Armijo, which must thus have been signed by the latter as early as 1841. These two depositions construed together establish, if they establish the making of this grant at all, that it was made in 1841. As it happens, there is found in the archives the borradores or rough drafts of the decrees of Armijo for the year 1841. The exact period covered by this archive, which is No. 1317, is from August 22, 1840, to January 19, 1842. The original of this archive is now in the possession of the clerk of this court, it being a matter of whose contents this court is authorized to take judicial notice. An examination of this shows that during the very period within which the grant in question is alleged to have been made by Armijo a record of his official acts was kept by him, and in that list there is no mention whatever of the Ojo del Apache order. (See certificate of Special Agent Flipper filed herewith.)

Unless we are to impugn the verity of the records of the former government—the very source and the only

source to which, under the California cases, we are justified in going—and are to believe loose oral testimony in preference to these records, we must conclude that no Ojo del Apache grant was ever made by Armijo; that it was never in the archives, and was never recorded therein, and thus the case is not one in which secondary oral evidence is admissible under the Peralta decision. This record illustrates anew the wisdom of the rule discussed in that case, where the effort to fritter away the record evidence received from the former government and to substitute for it the recollection of Mexican ex-officials is discussed. Here we have the positive record evidence, and here again the Mexican ex-officials, Aragon and Miranda, and here, as there, the rule should be applied. As was said in that case:

> Very many claims were tested by the rules and found to be valid and were confirmed; others were imperfect and could not be recognized. There commenced a struggle, which has never been abandoned, to induce the courts to fritter away the act of Congress and *substitute parol proof for record evidence.* The history of the cases in this court from California shows the extent of the struggle and the result. We have refused to allow oral testimony to prevail where archive evidence was necessary. * * * The Mexican nation attached a great deal of force to the disposition of its lands and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition and enabled the Government to ascertain with accuracy what portion of the public

lands had been alienated. *The record was the grant and without it the title was not divested.* The governor was required to give a document to the party interested, which was evidence of title and enabled him to get possession; but this "*título*" *did not divest the title unless record was made in conformity with law.* Written documentary evidence, *no matter how formal and complete or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed.*

This discussion, just concluded, while applicable to the position first above announced, that the proper foundation has not been laid in this case for secondary proof of the making of the grant here alleged, is also applicable to the wider proposition announced as Point *Three* of this brief, that there is no sufficient proof of the making of this grant, even considering the secondary proof as admissible. It is also relevant upon the kindred proposition, that the total absence of record evidence of the grant is fatal to the claim for a confirmation under the numerous California cases cited under Point *Three* of the Government brief in the Ortiz Case, No. 20, this term. Without repeating what has been above urged as to the Vigil Index and Archive 1317, as applicable to the broader proposition of no grant, it is believed that they will be given by the court due weight in passing on that proposition, as well as upon this preliminary one on the admissibility of proof.

Even admitting, however, that sufficient proof has been made as to the existence and loss of the archive copy of this grant, claimants have failed to complete their prelimi-

nary proof by accounting for the second original, which under the practice was given to the grantee. No effort was made to account for this. It would naturally be in the custody of the claimant, Mr. Hays, to whom it should have descended from Venturo Trujillo. Mr. Hays went on the stand (R., 94, 98), as a witness in his own behalf. Nothing whatever was asked him as to this second original, as to any search for it, as to its existence, or as to its destruction. It is respectfully submitted that under the most familiar rules of evidence the proper preliminaries to the consideration of the testimony of Aragon and Miranda as to the contents of a written instrument have not been complied with, and this court should therefore, on this rehearing, sustain the objection of the Government and decline to consider that testimony.

A second ground upon which the admissibility of this testimony is denied is found in the fact that it was taken after the proofs were closed and Mr. Proudfit's report on this claim forwarded to Congress. While under the act of 1854 the surveyor-general was not limited as to the time within which he might take his proof and make his report, still upon making his report he exhausted his jurisdiction; and unless the matter was remanded to him for reinvestigation by the Interior Department, as was done in a number of instances during Surveyor-General Julian's incumbency, he was without authority to act. Parties interested with the Government in defeating these private land claims were entitled to consider the report of the surveyor-general, when made, a finality, so far as his office was concerned, and a reopening of the

case by him at any time within his discretion was irregular and improper, unless by direction of the Department of the Interior. There is no pretense that Mr. Proudfit had any such authority in this case. On the contrary, he himself doubted his jurisdiction, "the matter being before Congress" (R., 115).

The provision of the land court act under which this testimony was received (sec. 5) constitutes an exception to the general rules of evidence, and only such testimony taken before the surveyor-general as comes clearly within its language should be received. Under that section the testimony must be such as has been "lawfully and regularly received" by the surveyor-general. It is respectfully submitted that the testimony of neither Aragon nor Miranda was lawfully and regularly received; indeed, it was not received at all, but was simply filed with the surveyor-general, and by him transmitted to the Commissioner of the General Land Office.

As counsel for claimant admits in his brief, page 47:

> Afterwards he [the surveyor-general] took new evidence, but would not open the case to change his decision, but reported the evidence to Congress for its action.

It is contended that this was neither "received" by the surveyor-general within the meaning of the law, nor, if received, was it "lawfully and regularly" received.

This last is insisted upon, not only on the ground that the surveyor-general's jurisdiction was at an end, but also, so far as Miranda's depositions are concerned, for the reason stated above, that he had no power to delegate the taking of testimony to the deputy clerk of a district court.

The following is the section of the act of 1854 under which the surveyor-general took cognizance of this claim in the first instance:

> SEC. 8. *And be it further enacted*, That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises.
>
> He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity of each of the same under the laws, usages, and customs of the country before its cession to the United States, and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos respectively, and the nature of their title to the land, such report to be made according to the form which may be prescribed by the Secretary of the Interior, which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico, and until the final action of Congress on such claims all lands shall be reserved from sale or other disposal by the Government and shall not be subject to the donations granted by the previous provisions of this act.

It is evident that the purpose of this act was to provide an official who should exercise a more than perfunctory supervision of these matters. The duty imposed was evidently a personal duty. He could not delegate it to others. It was obviously his duty to be present at all hearings affecting grants, to hear the testimony, to see the witnesses, to cross-examine them. No power was given him by statute to issue commissions to take deposition, and none of the instructions subsequently issued by the Secretary of the Interior gave him any such power. The reason was very evident. In matters of this character the Government was entitled to representation. While the investigation of these matters by the surveyor-general of New Mexico can not be said to have been in all or many of these cases of very great thoroughness, still his neglect of duty in no degree detracts from the position that the law required him to perform that duty.

The present record is an illustration of the wisdom of the requirements of the law and the danger involved in disregarding it. Here there were not even interrogatories framed by the surveyor-general, but all that was done was to issue a commission addressed to the deputy clerk of the third judicial district of the Territory of New Mexico (R., 101) directing him to take Miranda's testimony. This was taken in narrative form and returned to the surveyor-general. It was in effect an affidavit. There were thrown around its taking none of the safeguards contemplated by law, and it was in reality a delegation by Mr. Proudfit to a deputy clerk of a district

court of the performance of the duties of the surveyor-general of New Mexico. It is but just to say that he would probably not have done so had he not considered the case as already closed and beyond his jurisdiction, and this *ex parte* proceeding therefore of no consequence. This deposition of Miranda was not lawfully taken and was not received at all, so that it is not within the terms of the statute providing for the admission of testimony "lawfully and regularly received." Even if it be considered technically admissible under section 5 of the land court act, the circumstances under which it was taken—before a person having no interest in getting at the truth and without cross-examination—entitle it to but little weight. It was doubtless because of the well-known fact that much of the testimony presented to the several surveyors-general under the act of 1854 was, even when given before those officials themselves, taken without the safeguards afforded by a court of justice, that Congress inserted as a positive provision in the act of 1891 that that testimony should be given by the court only "such weight as in its judgment, under all the circumstances, it ought to have." It is respectfully submitted that the "circumstances" of the taking of this testimony condemns it to be adjudged under the statute of little weight.

Coming now to the first of the two witnesses, Rafael Aragon (R., 100), it will be noted that this witness starts out with the statement that "the grant was made to Venturo Trujillo and his children in the year 1841 by the alcalde, Damasio Salazar." He thereupon identified the paper introduced as plaintiff's Exhibit A (R., 57) as

the grant thus referred to. This one sentence contains at least two misstatements of fact, which illustrate the fallibility of the recollection of the witness. Witness says that "this Exhibit A was dated in 1841." The document itself shows that it is dated July 2, 1842. If his intention was to say that the governor's order under which this grant was made was dated in 1841, he is again shown to be incorrect, since archive 1317, above referred to, containing Armijo's *borradores* for the year 1841, shows that that order was not made during 1841. Again, witness says the grant by Salazar was to Venturo Trujillo and his children. The document itself shows that it was a grant to Trujillo alone. Two misstatements by a witness in a single sentence of his testimony do not constitute a very strong incentive for placing entire confidence in the rest of his testimony. It is to be noted, further, that the witness does not pretend to say that there was an order signed by Armijo, granting the land, but all he states is that there was a communication from the governor's secretary, Miranda, stating that in obedience to direction of the governor Salazar was to put Trujillo in possession of the tract. Aragon does not testify that he even saw this communication. His testimony therefore is simply to the effect that a written communication, which he does not say he saw, was received by Salazar from Miranda, in which Miranda says that the governor orders Salazar to place Trujillo in possession. This is hearsay several times over. Unless Aragon saw this communication—and he does not say he did—he was testifying to what *was told him* as to the contents of the

document; and since the document was not an order of the governor, but a letter of his secretary stating what the governor had ordered, it was hearsay twice over in that it was the declaration of a third person to the witness as to what a letter from still another person said the governor had done. It was doubtless to obviate the uncertain character of Aragon's testimony that claimants secured the *ex parte* declaration of Guadalupe Miranda (R., 102). Mr. Miranda, as an ex-official of the late Mexican Government, was one of the class of witnesses to whom reference was made so often in the California cases. In those cases this court laid down the following as a rule of evidence (*Luco Case*, 23 How., 515):

> It may be received as a general rule of decision that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States *unless it be found noted in the archives* or *the expediente, or some part of it be found on file among the archives where other and genuine grants of the same year are found;* and that owing to the *weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government can not be received to supply or contradict the public records or establish a title of which there is no trace to be found in the public archives.*

It was recognized by this court that these ex-officials were most unfavorably disposed toward the new government which had come in by power of the sword and had taken away from their nation a vast expanse of territory and from themselves lucrative and influential positions. To say that these officials—prejudiced as they were

against the new sovereign and predisposed as they were in favor of their countrymen left in the conquered territory—might come into court and establish grants where there was not a scintilla of record proof to support it was to place the lands of the nation at the disposal of its enemies. This the decisions of this court declared it would never do, in a long line of cases, among which are the following:

Bolton Case, 23 How., 347.
Castro Case, 24 How., 346.
Case of Knight's Administrator, 1 Black., 228.
Neleigh's Case, 1 Black., 298.
Romero's Case, 1 Wall., 743.
Peralta's Case, 3 Wall., 434.

It is respectfully insisted that the rule established in these California cases is peculiarly applicable to this case, and on the ground stated in the Luco Case, *supra*, the "weakness of the memory of these officials." This deposition of Miranda was taken in 1873, thirty years after the alleged occurrence, and at a time when he himself admits that "it has been so long since he saw the original papers in the case that without refreshing his memory by some of them he could not state minutely the facts and particulars of the grant. His memory is evidently vague on some of the matters. For instance, he had no recollection as to whether the grant was dated in 1841 or 1842. He does not remember the boundaries of the grant. He states that the decree directing the alcalde to place the petitioner in possession was signed by himself and Armijo, whereas Aragon, as above pointed out, says that it was a communication from Miranda, in which

Miranda says: "I am directed by his excellency the governor to say," etc., a phraseology entirely inconsistent with the supposition that Armijo signed the communication.

Miranda further says that the original papers and the return of the alcalde were thereupon deposited in the archives at Santa Fe. Aragon says the governor's order was deposited in the archives of the office of the alcalde of San Miguel del Bado. These are a few of the discrepancies that point out the wisdom of the rule that there must be archive corroboration of this character of evidence to justify a confirmation. It is incredible that after thirty years—with no occasion meanwhile to remember the circumstances, and with no memoranda at hand to refresh his recollection—this witness could have remembered one of his numerous official acts with the detail here set forth. The fact that while disclaiming any ability to state "minutely the facts and particulars of this grant," he insists that "the papers were full and complete and the grant perfect according to the laws of Mexico," simply adds the suspicion of mendacity to a one-sided deposition that might otherwise be passed over with the charitable reflection that the witness had confused the transaction with some other.

It is well said by the court below in its opinion (R., 116) that the mere memory of the secretary of the Territory, without any note or memorandum at all, thirty years after the alleged transaction, did not justify it in giving to the transaction the construction contended for by claimants. It is believed that were there nothing in the case to discredit the testimony of Miranda and Aragon, that testi-

mony, even if admissible, would fall far short of justifying a confirmation. However, the most convincing proof in this record that Aragon and Miranda, either willfully or otherwise, swore falsely is the grant document tendered by claimants as their Exhibit A. This shows beyond peradventure that when Damasio Salazar made this concession in 1842 he was not acting under any order of the governor; he was not, as counsel contend, engaged in giving juridical possession, an act that alcaldes were often called upon to perform under the Mexican and Spanish systems, but was acting on his own responsibility and in the exercise of a function arrogated to himself as one invested with power to alienate the public lands. It will require only a glance at the list of grants made during the Mexican dominance in New Mexico as set forth in the supplemental brief for the United States in the case of *Chaves* v. *United States*, No. 14, this term, to show the great variety of officers who attempted to alienate land. The governor, the territorial deputation, the political chief, the departmental assembly, the prefect, the alcalde, the town council, the *juez de paz*, each and all of them took a hand at disposing of the land of the nation. There was no official so humble but felt justified at one time or another in assuming the prerogatives of the supreme Government. This court has had to deal with several of these cases. The *Vigil Case* (13 Wall., 449) was a departmental assembly grant, and the *Crespin Case* (168 U. S., 208) involved a grant made by a prefect. Both of these claims this court rejected because of want of power in the granting officer.

The eminent justice of the peace who made the grant now under discussion was no novice at the art, despite counsel's naive assumption in his brief (p. 9) that "Salazar would not probably have undertaken to make a grant on his own responsibility," because Armijo was "a very arbitrary man." The Government offered to prove in this very case (R., 44, 51) that Damasio Salazar, this alcalde, made concessions of land at that time to numerous parties in the vicinity, claiming to have the right to do so; and the Government further offered to prove (R., 51) that Salazar never claimed in this case nor in any other of the cases in which he acted the right through Governor Armijo to make a grant to this man, or to any other man, but claimed the right of his own free will. The court below saw fit to limit the right of the Government to make this character of proof, although claimants (R., 93) had gone fully into the statements of Salazar as to this very transaction.

It is interesting, however, to note historically from the list of grants in the supplemental brief in the Chaves Case above referred to that at least one of the alcalde grants therein referred to was made by this same Damasio Salazar, being for the Chupaderos de las Lagunitas tract, in the immediate vicinity of the grant here claimed. In that case Salazar made his granting decree on December 18, 1839; and it is to be remarked that the title papers there presented, which are almost duplicates of that here presented, were adjudged of no validity by the court below on January 25, 1898, on the ground that it was a mere alcalde grant and that officer had no power to

act in the matter. The judgment has been acquiesced in and the decree of rejection is now final. (See also R., 75, as to the making of the grant by Salazar.) It will thus be noted that the gentle art of disposing of the nation's property was not unknown to Mr. Salazar.

It is claimed, however, by plaintiffs that the document presented is an act of possession executed by Salazar pursuant to an order of the governor and not an independent grant. This brings us to a consideration of this document.

It will be seen that, so far from being in the form of an act of possession issued pursuant to a superior order, this instrument is in the exact form followed in every grant made by competent authority. A proceeding for a grant under Spain or Mexico was always initiated by a petition, followed, after investigation by the governor, by a decree. In this case Trujillo petitions Salazar for a grant of the place and land commonly called Ojito del Apache. He states the reasons why it ought to be granted to him: he has a large family and he will thereby be enabled to support them and to give tithes to the church. It is incomprehensible why Trujillo would have gone through all this procedure had he already a grant of the land from Armijo. Why ask Salazar for it? Why state reasons in favor of a grant if he already had a grant from the governor? What discretion had Salazar but to obey the governor's order, if there were such an order? Why, therefore, invoke this discretion if he had none? Asking these questions is answering them. Salazar was appealed to by Trujillo because the latter desired him to make him a donation. Otherwise he would have cited him the

governor's order, which was the law of the case, and kept his own counsel about his large family and his tithes.

The alcalde proceeds thereupon to find that the petition is "a just one." What right had he to consider the justice or injustice of the petition, if, as Miranda testifies (R., 102), he had in his possession an order directing him "to place the petitioner in possession of the lands granted as aforesaid?" The alcalde then proceeds to make him "a donation." According to Miranda, the governor had already done so. Why should the alcalde undertake to donate to Trujillo what the head of the department had already donated to him? The alcalde recites that, acting in conformity with the supreme decrees, he makes Trujillo "the said donation in the name of God and the supreme Mexican nation." The supreme decrees evidently refer to the decrees of the supreme Government. The departmental government was always referred to as the superior government, whereas the national Government was the supreme Government. (See title papers in *Catron* v. *United States*, No. 34, this term; also decree of June 13, 1843, secs. 135, 140, 141; Reynolds, p. 242.) Indeed, in this very same document the alcalde proceeds to refer to the Mexican nation as the "supreme Mexican nation." (R., 58.)

The attempt by claimants to distort this into a reference to an order of Armijo is too transparent to entitle it to much consideration. Had such a reference been intended it would have referred either to the superior orders or decrees, or more probably, to the specific order itself. A minor official acting under an order from

a superior officer would, as a matter of first impulse, quote that order as his authority. This is illustrated in the act of possession of the alcalde found in the case of *United States* v. *Elder*, No. 35, this term, where the alcalde had a specific order to give possession such as claimants contend was given in the case at bar. That document shows that the first thing the alcalde does in making up his statement of the act of possession is to recite the order of the prefect under which he is acting.

The whole act of possession in that case is valuable as a basis of comparison with this. It illustrates the difference between a possession given by an alcalde pursuant to superior order and an independent grant made by an alcalde as in the case now under discussion, and it emphasizes anew the fact that this Ojito del Apache grant is an original donation from an alcalde, pure and simple. The term "supreme decrees," manifestly does not refer to an order from Armijo for another reason. Armijo had, according to Miranda and Aragon, made only one decree, so that a reference to "decrees" could not have referred to what Armijo had done, but to some laws of the supreme government which the alcalde considered gave him power to act in such matters. Laws were often called decrees, as indeed they were. (Reynolds, pp. 203, 223, 224, 238, 239, 240, 241, 243.) Claimant's counsel admit (brief, p. 13) that Mexican laws were sometimes called decrees, and it is evident that this is what Salazar had in mind.

Further, Salazar says: "Acting in conformity with the supreme decrees, I have made him a *donation*," etc. The order of Armijo to which Miranda testifies does not, it

will be noted, order Salazar to make Trujillo a donation—Armijo, says Miranda, had already done that—but to give Trujillo possession. The "supreme decrees," by virtue of which Salazar made the donation, therefore must have been something other than the governor's order, for that order had nothing about making a donation.

But on the meaning of these words, "supreme decrees" we have the testimony of Aragon, the person who himself wrote them. Certainly if they referred to an order of Armijo, Aragon, who wrote them with his own hand, would have known it, and yet when Aragon was confronted with the paper, Exhibit A, by Surveyor-General Proudfit (R. 101), the following ensued:

> Q. Examine the paper marked "Exhibit A" and state whether it contains any allusion to the order you have mentioned as given by Governor Armijo.
>
> *A. I believe it contains none.*
>
> Q. Why, in writing the grant paper "Exhibit A," did you not make some allusion therein to the order of the governor?
>
> *A. I presume it was omitted by mistake.*

Alcalde Salazar goes on in his grant (R., 58) to impose conditions on his grantee, requiring him to observe "the requirements which our laws provide, under the condition and restrictions that if he does not provide a protection to prevent the damages which may result to him he is under obligations to bear them, it being commons and pasture grounds of the inhabitants of this precinct."

He then goes on to fix the boundaries of the grant, and after some further formalities the instrument closes.

There is no mention whatever of the delivery of juridical possession by the alcalde, the going of the alcalde to the premises, the pointing out of boundaries, the plucking of grass and the throwing of stones, the taking of the grantees by the hands and leading them over the lands, and the innumerable other formalities which under the Spanish and Mexican customs were invariable adjuncts of the investiture of possession. (See *Elder Case*, No. 35, this term, and the acts of possession in other cases recently decided from the Court of Private Land Claims.) If, as claimants allege, the governor ordered Salazar to deliver possession, and this was his delivery of possession, it is passing strange that he makes no mention of delivering possession; and that the whole document treats of making a grant, something the governor, according to Aragon and Miranda, had done long since.

If Salazar was trying not to make a grant, but to give possession of a grant already made, he ignominiously failed both in omission and in commission; he did make a grant; he did not confer judicial possession. He was a typical sinner in that he "left undone the things he ought to have done, and did the things he ought not to have done." As a matter of fact, however, Salazar's only offense was that he attempted here to make a grant when he had no authority so to do. Claimant's oral testimony in this case at every point conflicts with the written instrument presented as his Exhibit A. The testimony of Miranda can not stand in the face of that instrument. One or the other must fall, and it is not believed that this court will be any more inclined than was the

court below to give preference to the recollection of Secretary Miranda after a lapse of thirty years over the plain and unambiguous recitals of a written instrument contemporaneous with the transaction inquired into.

IV.

Assuming that a grant was made by Governor Armijo, as alleged, there is no proof of the character of the grant sufficient to enable the court to say that it is a claim within its jurisdiction.

The only proof of the character of the grant is found in the depositions of Aragon and Miranda. Aragon (R., 100) describes the governor's order as being one in which the alcalde is ordered to "proceed to the place called the Ojito del Apache, and will there place the petitioner, Venturo Trujillo, in possession of that land." It is manifest that an order to place a party in possession is not necessarily a title in fee. The possession conferred may have been a provisional or temporary one, such as was given in *Bergere's Case* (168 U. S., 66). It might have been based upon a mere permit to pasture, such as in the *Zia Case* (168 U. S., 198). It might have been upon condition as in *Cessna's Case* (169 U. S., 187). Yet in each of the three cases just cited this court held the claim presented not entitled to confirmation, notwithstanding possession conferred, because not titles such as claimant "would have had a lawful right to make perfect" had there been no change of flag. The character of the concession, as indicated by Aragon, does not take the case out of either of the conditions found fatal in the Bergere, the Cessna, and the Zia cases.

The other witness, Miranda, expressly disclaims (R., 103) any recollection of the facts and particulars of the grant, so that his testimony does not throw any light upon this particular proposition. It is true that Miranda, at the conclusion of his testimony, says, notwithstanding the fact that he can not recall "the facts and particulars" of the grant, that "the papers were full and complete and the grant perfect, according to the laws of Mexico." This is a mere conclusion of law, however, and is not evidence. Its value, even as an expression of law coming from Miranda, is impaired by the fact that it is manifestly incorrect. This grant could not be "perfect according to the laws of Mexico"—the law of 1824 and the Regulations of 1828—without the approval of the departmental assembly. It is not pretended that such approval was ever had in this case, so that Miranda was as far astray on his assumption of law that the grant was "perfect" as he was in his statements of fact as to the making of a grant at all. The fact that the testimony of these and other witnesses refers to a "grant" to Trujillo does not establish its character. The question still remains, What kind of grant was it?

The Court of Private Land Claims is a court of limited jurisdiction.

> *Ainsa* v. *United States*, 161 U. S., 222–223.
> *Cessna* v. *United States*, 169 U. S., 187.
> *Hayes* v. *United States*, 170 U. S., 637–647.

Before parties can secure a confirmation at its hands, they must bring themselves by their proof within its jurisdiction. Until they do this the court is powerless to act. It seems proper, therefore, to call attention to a

few of the provisions of statute under which, and only under which, the court below is permitted by law to proceed.

Under section 6 of the act of March 3, 1891, parties are required to set forth in their petition—and since they must allege it they must prove it—"the *date and form* of the concession, warrant, or order of survey."

In this case there is no definite proof as to its *date*. It was made some time during 1840 or 1841, perhaps 1842. No serious attempt was made to allege or prove its *form* so as to enable the court to decide whether it conveyed the fee or something short of the fee. For all that appears to the contrary, it might have been a mere license to occupy, which has uniformly been held to be a character of title not entitled to recognition.

De Haro v. *United States*, 5 Wall., 599.
Serrano v. *United States*, 5 Wall., 451.

It might, for aught that appears to the contrary, have been a mere permit to pasture, such as was held in *Zia* v. *United States* (168 U. S., 198) to be not entitled to confirmation under the act of 1891. The definition of the word "grant," as given in the case of *Strother* v. *Lucas* (12 Pet., 436), is broad enough to have included either of these. *Non constat*, further, but that it was a grant made upon conditions proof of performance of which "within the time and manner stated in the concession" is made by subsection 8 of section 13 of the act of 1891 a prerequisite to a confirmation.

In the Jose Garcia Case, a grant claim decided by the Court of Private Land Claims since that here appealed from, the subject here discussed has been considered very

fully. In that case the recitals of a grant to the predecessors in interest of claimants were not in private deeds, but in grant documents, in one or two instances over the signature of the governor of the province itself. The recital of a grant to Garcia was made in these not once, but in three separate and solemn instruments signed by the *alter ego* of the Crown himself; and yet the Court of Private Land Claims held upon these facts that the claim could not, under the wording of the act of 1891, be sustained.

A copy of the opinion in that case, which is entitled *Mariano S. Otero* v. *United States*, No. 92, is attached to the brief for the Government in the cases of *J. Francisco Chaves* v. *United States*, Nos. 38 and 39, this term. It is believed that this will be found quite helpful upon this proposition, and that this court must reach the same conclusion in this case as did the court below in the Jose Garcia Case: that there is no evidence showing or tending to show the character of the grant—if there was a grant—and that the claim must be rejected upon this ground if upon none of the others urged in this brief.

V.

The possession shown by plaintiffs does not justify the presumption of a grant from competent authority.

Claimant's counsel devotes a large portion of his argument to quotations from the testimony establishing possession of a portion of the tract in question by the alleged grantee and his successors in title. It is not denied that there is some proof of possession by Trujillo of a part of

the premises in question prior to the treaty, but it is denied that this possession was either continuous or exclusive, both of which qualities are essential to prescriptive title. As was said by this court in the case of *Whitney* v. *United States* (167 U. S., 529, 546):

> The claimant also relies upon a long-continued adverse possession of this land, maintained for nearly one hundred and seventy years from the date of the grant, and nearly eighty years from the date of the *testimonio* issued by the *alcalde mayor*, de Baca. Had it been shown that this possession was complete, adverse, and undisputed during the whole life of this grant, such possession would probably be regarded as complete evidence of title. Nor are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession; but, in order to make it of any particular weight, it should be shown to have been exclusive and that no other person pastured or had the same right to pasture upon these lands.

See also *Bergere* v. *United States* (168 U. S., 79, 80).

A few extracts from the record will suffice to show the very loose character of the possession held by Trujillo. Witness Pablo Lucero knew the Ojo del Apache from 1840 to 1855, his residence being at Chupaderos, which is adjacent. On his direct examination (R., 30) he was asked as to the condition of the spring from 1840 to 1855, and he stated that there was no house there, no land cultivated or broken, and no one living there during that period; that Trujillo never lived at the Apache Spring, but at San Miguel, which is many miles away. He further testified that in going there in 1855 to take up his residence

it was found that there were no improvements of any character at the spring, no houses, nor ruins of any houses, and that the property was at that time known as public land. It is true that this witness was at the spring itself only once or twice prior to 1855, but he has since the year 1840 lived continuously at Chupaderos, which is about 4 miles from the spring. In a country community anything that happens within a radius of 4 miles is a matter of common knowledge in a very short period, and had Trujillo occupied this tract for any length of time, or made any improvements on it, or claimed it exclusively, it would have been known by witness Lucero. Witness Juan de Jesus Jaramillo (R., 38) also testified to knowing the Ojo del Apache in 1840, and again in 1852. At neither time, says witness, was Trujillo in possession, and in the spring of 1852 no one was living there, there were no houses, nor corrals, nor acequias. Trujillo was not living there, but at San Miguel. His family did not live there and he was neither cultivating nor pasturing there, and witness never knew of his living there at any time (R., 39). This witness further shows that so far from Trujillo's having the number of cattle or sheep to which claimant's witnesses refer as pasturing on this property, he was a poor man, one of comparative insignificance in his community. It is hardly probable that such a man would have been singled out by Armijo as an object of his favor and official generosity to the extent of about 50,000 acres of public lands. As was said in the Cambuston Case (20 How., 59):

> In the examination of the evidence in this case we have found it very difficult to resist a suspicion

as to the *bona fides* of the grant in question. It is a pure donation, made without pecuniary consideration or meritorious services rendered to the Government of Mexico.

See also the *Roland Case* (7 Wall., 746).

Nicholas Apodaca, another witness examined for the Government (R., 42), has known the property in question since 1842, and was herding his uncle's flocks on it in the months of May, June, July, August, and September, 1842. He testified that Trujillo came there during that period, but stayed there only about two or three days. This was evidently about the time he received the grant from Alcalde Damasio Salazar. Witness seemed to be uncertain about the month, but is positive that it was in the year 1842. He says that Trujillo did not return to the Spring; that he never lived there afterwards; that he never used it as a pasture, as he never had any animals, and, on the contrary, it was used by various other people as a pasture ground. This witness, who lived in the immediate vicinity, further testifies that Trujillo at the time of his death was living at San Miguel, and he and his family had lived there from 1842 on to the date of his death. Manuel Apodaca, examined on the part of the Government (R., 48), also testified that he first knew the Apache Spring in 1842, and "knew it vacant," and after that, when he knew it, no one was living there, there were no houses, no cultivated lands, and no corrals. In answer to a question as to its use for pasturage, witness said it was so used by "anybody; they were common pasture; so many herders pastured there that I did not know who they were," but Trujillo was not among them

(R., 51). This witness also testified to certain statements made by Trujillo in his presence in 1842 as to this property, which are binding on claimant, a privy in estate to Trujillo. These throw some light on the source from which Trujillo claimed title, as, for example, this statement (R., 50):

> Well, sir, I went to work at that land at the Ojo del Apache *that was given to me by Damasio Salazar*, but was not successful in it, because the water is not enough. * * * The $3 that I paid to Don Damasio Salazar for that *hijuela* was worth more than the whole Ojo del Apache.

The record further shows (p. 91) that the extent of the occupation was exceedingly limited, only a few hundred varas being used.

From all this testimony it will be seen that the possession held by Trujillo was very far from being extensive, continuous, or exclusive prior to the treaty. Indeed, it could not be exclusive, since under the very terms of the alcalde grant it is expressly recited (R., 58) that the land in question is "commons and pasture ground of the people of the precinct." Since the treaty the public surveys of the United States have been extended over the tract, and a number have settled thereon, and in some instances secured Government patents. (See Answer of Adlon et al., R. 18.) One family, the Montoyas, have been living on this tract, according to the testimony of the claimant Hays himself (R., 98), thirty or forty years, under claim of title different from his own. (R., 97.)

Viewed in its most favorable light, therefore, the possession which plaintiffs attempt to prove was one for

only the four years intervening between 1842, the date of the paper marked "Exhibit A," and the date of the American occupation of New Mexico, or six years up to the date of the treaty of 1848. Adverse possession against an individual, even when exclusive and continuous, raises no presumption of a grant upon a duration of only four or six years, and if time ever ran against the Mexican or Spanish Governments—a proposition from which the appellees in this case most strongly dissent—it never presumed a grant on six years' possession.

This question of grants presumed from long continued possession is discussed by this court in the case of *Hayes* v. *United States* (170 U. S., 647), where it is held that even if time ran against the Mexican sovereignty the term of ordinary prescription was ten and of extraordinary prescription was thirty years, neither of which periods had run in this case.

Upon the general proposition that time did not run against the Mexican sovereignty, counsel for the Government desires to call the attention of this court to the brief filed on behalf of the United States in the cases of *Chaves* v. *United States*, Nos. 38 and 39, this term, and above referred to. Since this case and those will be submitted to the court about the same date, it does not seem necessary to repeat here the considerations there urged to support the proposition that possession under the Spanish or Mexican Governments could never ripen into a prescriptive title against them. Upon this general proposition the following authorities are instructive:

Orozco's Legislation and Jurisprudence on Public Lands, Vol. II, p. 1007.

Id., Vol. II, Title III, p. 993 et seq.
Hall's Mexican Law, sec. 53 et seq., also secs. 612, 639.
Crespin v. *United States*, 168 U. S., 208.
Hayes v. *United States*, 170 U. S., 637.
Ely's Administrator v. *United States*, 171 U. S., 233.

Even less worthy of serious consideration is the proposition upon which counsel seems to insist that possession since the treaty may be considered as a basis for presuming a grant. The validity of this claim must be adjudged as of the date of the treaty. It is announcing a novel proposition indeed, however, to urge that a citizen of this country may, by mere possession, acquire rights in the soil upon which he may challenge the title of the Government. The reason of the rule of *nullum tempus* as applied to our system of government is clearly stated by this court in the case of *Lindsey* v. *Miller* (9 Pet., 672), where it is said:

> It is a well-settled principle that the statute of limitations does not run against the State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions until the statutes of limitations shall run, and then they would become invested with the title against the Government and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it could be entirely impracticable, by the use of any power within the reach of the Government, to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the Government.

The following cases repeat and emphasize this most salutary rule:

Gibson v. *Chouteau*, 13 Wall., 99.
Weber v. *Harbor Commissioners*, 18 Wall., 70.
Sparks v. *Pierce*, 115 U. S., 408.
Redfield v. *Parks*, 132 U. S., 239.

So also in *Hayes* v. *United States* (170 U. S., 653) it is said by this court:

> Whatever may have been the rule as to the operation of prescription against the Spanish and Mexican Governments, it did not run after the treaty against the United States.

But even if a grant from competent authority could be presumed upon the character and length of possession shown by this record, such a presumption can not be indulged here, because the record shows the source of the title to be in the alcalde grant, and thus precludes any presumption on the subject. The void concession by Alcalde Salazar accounts for the possession proved and furnishes a plain and unmistakable cause to which it is referable. The facts on this point bring the case squarely within the rule laid down by the supreme court of California in the well-considered case of *Nieto* v. *Carpenter* (21 Cal., 455), where it is said:

> Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and established facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

But, whatever else may be said on this proposition, it is confidently submitted that a title resting on presumption from long continued possession is not such a claim as the Court of Private Land Claims has jurisdiction to confirm.

An even casual examination of the act of 1891 will show that its provisions do not confide to the Court of Private Land Claims the duty of confirming claims resting upon mere possession. Thus the provision of section 6 that "any person * * * claiming lands within the limits of the territory derived by the United States from the Republic of Mexico * * * by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm," may present his claim, is utterly inconsistent with the theory that anything but a written muniment of title can constitute the foundation of a suit in the Court of Private Land Claims.

In *Lafayette et al.* v. *Blanc* (3 La. Ann., 59) the language construed was identically the same contained in this act, being "the title to lands claimed by virtue of incomplete French or Spanish 'grants, concessions, warrants, or orders of survey,'" and this was held by the court not to confirm any claim unsupported by written evidence of title emanating from the French or Spanish Governments. (See also *State* v. *Cardinas*, 47 Tex., 250.)

The act of 1891 is, in its description of the class of titles which it covers, very similar to the act of May 26, 1824 (4 Stat. L., 52), the wording of the latter being "by virtue of any French or Spanish grant, concession, warrant, or order of survey legally made, granted, or issued

by the proper authorities." In cases arising under that act, as reenacted by the law of July 17, 1844 (5 Stat. L., 676), it was held that there was "no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring or professing to confer a title of some description."

United States v. *Powers's Heirs*, 11 How., 569.
United States v. *Rillieux's Heirs*, 14 How., 188.

The further provisions of the act of 1891 are still more conclusive of the proposition that the court can not proceed upon *mere* naked possession. Thus, section 6 further requires the petition to state the *date* and *form* of the grant, possession, warrant, or order of survey.

The act of 1824, above referred to, contained a like provision, and its purpose is discussed in *Moore's Case* (12 How., 216), where it is said that this is required "in order that it may be seen whether the officer making the concession or sale had power to do so at the time it was done." But if grants may be confirmed on allegations and proof of mere possession this provision of statute becomes nugatory and senseless, as also the further provision of section 6, which requires that the petition state "by whom" the grant is made.

Further, under section 8, permission to invoke the jurisdiction of the court is extended only to those holding under a *title* derived from the Spanish or Mexican Government. This *title* must be one "lawfully and regularly derived" from one of the Governments just mentioned (subsection 1 of section 13), and not only that, but it must be made to "appear" that it is so derived. (*Hayes* v.

United States, 170 U. S., 637.) It must further be made to "appear" that every condition and requirement, either antecedent or subsequent, contained in the original grant has been performed in the time and manner stated in such grant. All these provisions of the act of 1891 show that it was not intended to include claims resting upon mere possession; and the provisions of the statute are equally exclusive of grants resting upon naked possession, whether such possession shall have extended back a half dozen years or a century before the treaty.

If there were any doubt upon this proposition it is, however, dispelled by the fact that Congress in the act of 1891 has not only withheld from the Court of Private Land Claims the power to recognize anything short of a paper title, but has actually confided to another department of the Government the power, under certain restrictions, to recognize and provide for possessory claims. Thus, under section 16 of the act as amended by the act of February 23, 1893 (27 Stat., 47), provision is made for the protection of anyone who has, through himself, his ancestors, grantors, or their legal successors in title or possession, been in the continuous, adverse, actual, *bona fide* possession of land for twenty years next preceding the time of survey of the township wherein situate. Under this section, upon making proper proof, such possessors of land may receive a patent therefor to an extent not to exceed 160 acres. A similar provision is made in section 17 of the act as amended by the act of February 23, 1893, above referred to, for persons claiming title in townships already surveyed, who had been

in "actual, continuous, adverse possession" of lands for twenty years next preceding such survey.

These two sections measure the degree of recognition which Congress is thus far willing to accord to claims resting upon mere possession, although such possession may have been sustained for years under the former government. To secure more liberal recognition, parties must either present to the Court of Private Land Claims "a grant, concession, warrant, or order of survey" lawfully and regularly derived from the Government of Spain or Mexico, with which they can connect themselves, or, if unable to do this, they must appeal to the legislative department of the Government.

It is respectfully submitted that the decree of the Court of Private Land Claims dismissing this petition and rejecting the claim should be affirmed.

Respectfully submitted.

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